87-84

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

E.I. DUPONT DE NEMOURS & COMPANY, INC.,
Petitioner

v.

ROBERT JOHANSEN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Federal Rule of Civil Procedure 15(c) or an applicable state statute will govern relation back of amended pleadings for purposes of applying a state statute of limitations in a case in federal court based solely upon diversity of citizenship.

2. Whether a complaint filed in federal court alleging only that a product was "defective and/or unreasonably dangerous" is sufficient under Federal Rule of Civil Procedure 8(e) to state a distinct state law claim for breach of warranty.

3. Whether the statute of limitations contained in § 2.725 of the Texas UCC applies to injuries occurring in a foreign country in a case where the substantive provisions of the UCC do not apply.

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CASES

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ROBERT JOHANSEN,[1]
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

E. I. duPont de Nemours & Company, Inc., petitions for a Writ of Certiorari to review the judgment in this case of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 810 F.2d 1377 (App. A, infra). The opinion of the district court is reported at 627 F.Supp. 968 (App. B, infra).

1. There are no parties to this lawsuit other than petitioner and respondent. Du Pont's affiliates are listed in App. D.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1987 (App. A). A petition for rehearing was denied on April 14, 1987 (App. C, infra). This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND FEDERAL RULES OF PROCEDURE INVOLVED

1. The Federal Rules of Decision Act, codified at 28 U.S.C. § 1652 provides:

> The laws of the several states, except where the Constitution or Treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

2. The Federal Rules Enabling Act, codified at 28 U.S.C. § 2072 provides:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial

> by jury as at common law and as declared by the Seventh Amendment to the Constitution.
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.
>
> All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

3. Texas Revised Civil Statute, Art. 4678 (currently codified at Texas Civil Practice and Remedies Code § 71.031) provides:

> Whenver the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any foreign State or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign State or country or of this State, such right of action may be enforced in the courts of this State within the time prescribed for the commencement of such actions by the statutes of this State. All matters pertaining to procedure in the prosecution and maintenance of such action in the courts of this State shall be governed by the law of this State, and the court shall apply such rules of substantive law as are appropriate under the facts of the case.

4. Texas Revised Civil Statute, Art. 5539b (currently codified in Texas Civil Practice and Remedies Code, § 16.068) provides in pertinent part:

> Whenever any pleading is filed by any party to a suit embracing any cause of action, cross-action, counterclaim, or defense, and at the time of filing such pleading such cause of action, cross-action, counterclaim, or defense is not subject to a plea of limitation, no subsequent amendment or supplement changing any of the facts or grounds of liability or of defense shall be subject to a plea of limitation, provided such amendment or supplement is not wholly based upon and grows out of a new, distinct or different transaction and occurrence.
>
> . . .

5. Texas Revised Civil Statute, Art. 5526 (currently codified at Civil Practice and Remedies Code, § 16.003) provides in pertinent part:

> There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions for suits in court of the following description:
>
> . . .
>
> 6. Action for injury done to the person of another.
>
> . . .

6. Texas Business and Commerce Code, § 2.725 provides in pertinent part:

> (a) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . .

> (b) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
>
> . . .
>
> (d) This section does not alter the law on tolling of the Statute of Limitations nor does it apply to causes of action which have accrued before this title becomes effective.

7. Federal Rule of Civil Procedure 15(c) provides in pertinent part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. . . .

8. Federal Rule of Civil Procedure 8, Subdivisions (a) and (e) provide in pertinent part:

> (a) Claims for relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, . . .
>
> . . .
>
> (e) Pleading to be concise and direct; consistency.
>
> (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses.

. . .

STATEMENT OF THE CASE

1. Plaintiff Robert Johansen, an Englishman, was an oilfield worker who was injured on March 3, 1980 while working in the Lybian desert for Halliburton Manufacturing & Services, Ltd., his English employer. He injured his hand and arm when a casing gun he was assembling prematurely detonated. The casing gun, explosive charges, fuses, and all parts and equipment other than a small booster called a C-63 were manufactured by companies other than DuPont. DuPont is a Delaware corporation that manufactures C-63's only in Pompton Lakes, New Jersey.

2. Plaintiff originally brought a lawsuit in England against his employer. That case was settled in July, 1985. On February 23, 1983, more than two years after the accident, plaintiff filed this lawsuit in the United States District Court for the Eastern District of Texas. Jurisdiction was based solely upon diversity of citizenship. 28 U.S.C. § 1332. Plaintiff sued DuPont and seven other defendants, alleging only claims for negligence and products liability.

DuPont and the other defendants promptly filed motions for summary judgment based on the applicable Texas two year statute of limitations. The district court denied the motions on February 10, 1984 without a hearing or written opinion. One week later, plaintiff and all

defendants except DuPont filed a joint motion to dismiss and to transfer the case to England. That motion was granted a short time later.

Plaintiff never alleged a breach of warranty claim until he filed his First Amended Original Complaint on February 6, 1985, more than four years after the accident. After obtaining a deposition from the plaintiff, DuPont filed a second motion for summary judgment. District Judge Howell Cobb conducted a hearing on the motion, and granted it on November 7, 1985.

3. In his written opinion (App. B) Judge Cobb concluded that plaintiff's original complaint stated claims for negligence and products liability only, and he held those claims were barred by the Texas two-year statute of limitations. He further held that the claims for breach of warranty were barred by the Texas U.C.C. four-year statute of limitations (assuming it applied as an exception to the two-year statute) because those claims were not made until more than four years after the accident.

Judge Cobb reasoned that relation back of plaintiff's amended complaint to the original complaint was governed by the Texas relation back statute at Art. 5539b, rather than Federal Rule of Civil Procedure 15(c). The Texas statute does not permit relation back to a pleading that was barred by limitations when it was filed. Therefore, Judge Cobb held the amended complaint alleging breach of warranty did not relate back under Texas law to the original complaint that only stated claims barred by limitations, and he granted DuPont's motion for summary judgment.[2]

---

2. Judge Cobb made an alternative holding that the Texas U.C.C. four-year statute of limitations did not even apply as an exception to the general two-year statute in cases involving injuries in a foreign country, to which the Texas U.C.C. did not apply.

4. On appeal, the Fifth Circuit affirmed the dismissal of the product liability and negligence claims, but vacated and remanded on the breach of warranty claims. (See App. A). The Fifth Circuit held that Federal Rule 15(c) controlled over the Texas relation back statute. Thus, the circuit court held the breach of warranty claims related back to the date of the original complaint, which was within the four-year statute of limitations. Because of this ruling, the Fifth Circuit did not reach the issue of the adequacy of plaintiff's pleadings in his original complaint.

The court also held that the four-year U.C.C. statute of limitations would apply to an injury occurring outside of Texas, if the substantive law to be applied in the case under Texas conflict of law rules recognized a breach of warranty claim. The Fifth Circuit remanded the case for the District Court to determine which jurisdiction's substantive law will apply, and whether that law recognizes a breach of warranty theory for personal injuries.

REASONS FOR GRANTING THE PETITION

THIS CASE PRESENTS THE IMPORTANT QUESTION OF THE APPLICATION OF STATE STATUTES OF LIMITATION IN DIVERSITY CASES, WHEN THE STATE RELATION BACK RULE DIFFERS FROM RULE 15(c).

1. This Court has never ruled on the specific issue presented, and there is a split among the circuits. The Fifth and Eighth Circuits have applied Rule 15(c), while the First and Ninth Circuits have applied state law in cases where it was more liberal than Rule 15(c). *Compare, Johansen v. E.I. duPont de Nemours & Co.*, 810 F.2d

1377, 1380 (5th Cir. 1987); *Welch v. Louisiana Power & Light Co.*, 466 F.2d 1344, 1345 (5th Cir. 1972) (amended pleading to correct misnomer); and *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413, 415-16 (8th Cir. 1967), with *Ragsdale v. Haller*, 780 F.2d 794, 799-801 (9th Cir. 1986); *Anderson v. Allstate Insurance Co.*, 630 F.2d 677, 682 (9th Cir. 1980) and *Marshall v. Mulrenin*, 508 F.2d 39, 44 (1st Cir. 1974). *See also, Powell v. Brantly Helicopter Corp.*, 396 F.Supp. 646 (E.D. Tex. 1975) (applying Texas Article 5539b instead of Rule 15(c)).

Professors Wright and Miller have noted:

> There has been considerable uncertainty whether a federal court sitting in diversity jurisdiction is free to apply the relation back principle embodied in Rule 15(c) instead of a conflicting state rule on the subject . . ."

Wright and Miller, *6 Federal Practice and Procedure* § 1503 (1971). This court should grant the petition to establish a uniform rule and to promote an efficient and uniform handling of diversity cases.

The Fifth Circuit's application of Rule 15(c) instead of a different state rule is contrary to this Court's more recent holdings mandating the application of state tolling rules when applying state statutes of limitation. In *Chardon v. Fumero Soto*, 462 U.S. 650 (1983) this Court applied Puerto Rico's tolling provisions rather than a federal rule in a civil rights class action, and in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) this Court applied a New York tolling rule stating:

> "In § 1983 actions, however, a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases they are binding rules of law." *Id.* at 484.

See also, Johnson v. Railway Express Agency, 421 U.S. 454 (1975) and *Wilson v. Garcia,* 471 U.S. 261 (1985) concerning application of state limitation rules in civil rights cases.

While these examples are civil rights cases which "borrow" state limitation laws, the same principle is even more compelling in cases based solely upon diversity of citizenship. The Rules of Decision Act, and *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938) and its progeny reflect the important concerns of federalism and the protection of the States' interests in the application of their laws in diversity litigation in federal courts. This Court has twice stated:

> "We cannot give [the cause of action] longer life in the federal court without adding something to the cause of action. We may not do that consistently with Erie R. Co. v. Tompkins."

Walker v. Armco Steel Corp., 446 U.S. 740, 746 (1980); *Ragan v. Merchant's Transfer & Warehouse Co.,* 337 U.S. 530, 533-34 (1949). *See generally,* Redish and Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma,* 91 Harv. L. Rev. 356 (1977) and Ely, *The Irrepressible Myth of Erie,* 87 Harv. L. Rev. 693 (1974).

Texas has clearly articulated its policy that, in cases involving injuries in foreign countries, the suit must be

brought ". . . within the time prescribed for commencement of such actions by the statutes of this State." Art. 4678. Further, the Texas relation back provision at Art. 5539b is more than a Texas rule of procedure: it is a statute adopted by the Legislature as an integral part of the Texas statutes of limitation system. The application of Rule 15(c) under the facts of this case violates the Rules of Decision Act, 28 U.S.C. § 1652 and the provision in the Rules Enabling Act that the Rules of Civil Procedure ". . . shall not abridge, enlarge or modify any substantive right . . .". 28 U.S.C. § 2072.

2. Another practical consideration favoring application of the state rule is the crowded federal court docket. This problem is only exacerbated when federal cases based upon diversity of citizenship are allowed to proceed when they would be barred by limitations in state court. Further, the vague pleadings of the type used by plaintiff in this case hinder an efficient administration of the federal court's civil docket. While Rule 8(a) requires only a "short and plain statement of the claim", Rule 8(e) also requires that each averment of a pleading be "simple, concise and direct." As noted by Judge Cobb, the trial court should not be required to "discover unstated claims." Likewise, in *Murphy v. White Hen Pantry Co.*, 691 F.2d 350 (7th Cir. 1982) the court held:

> "The district court is not required, however, to speculate over the nature of plaintiff's claim or to refuse to enter summary judgment for the defendant simply because the plaintiffs may, theoretically, be entitled to recover under a cause of action based on facts never alleged in the complaint." *Id.* at 353.

3. Finally, the petition should be granted because the Fifth Circuit clearly erred in holding that the Texas

U.C.C. statute of limitations will apply to claims not arising under the U.C.C. Although this is a matter of state law, the U.C.C. has been adopted by forty-nine of the states, and its uniform application is a matter of national concern. Defendant has not been able to locate any other case in the nation which applied the U.C.C. statute of limitations to a claim not arising under the substantive provisions of the Code. Although this Court has traditionally hesitated to review issues of state law, it will do so when the lower court's "conclusions are shown to be unreasonable." *Propper v. Clark,* 337 U.S. 482 (1949).

This court's reluctance to review issues of state law has been based upon the principle that the lower court is more familiar with its application. However, in this case the district court held the limitations statute was not applicable, while the circuit court held that it was. Therefore, a conflict exists between the two lower courts.

The Fifth Circuit's conclusion that Texas U.C.C. § 2.725 will apply to a warranty claim arising under the law of Lybia, New Jersey, or some other foreign jurisdiction was unreasonable. The landmark Texas case for applying U.C.C. § 2.725 to a personal injury action made it clear that the section applied to claims "arising under the code". *Garcia v. Texas Instruments, Inc.,* 610 S.W.2d 456, 459 & 465 (Tex. 1980). Further, the Fifth Circuit plainly erred in its reliance upon *Jacob E. Decker & Sons, Inc. v. Capps,* 164 S.W.2d 828 (Tex. 1942) and *McKisson v. Sales Affiliates, Inc.,* 416 S.W.2d 787 (Tex. 1967) for its holding that Texas recognized a common law action for breach of warranty equivalent

to U.C.C. warranties, prior to Texas' adoption of the U.C.C. Those opinions were early attempts to articulate a products liability theory, and those opinions specifically stated that the implied warranties being adopted were not contractural warranties, of the type contained in the U.C.C. In *Decker* the court stated:

> "While a right of action in such a case is said to spring from a 'warranty', it should be noted that the warranty here referred to is not the more modern contractual warranty, but is an obligation imposed by law to protect public health." *Id.* at 832.

In contrast, Chapter 2 of the Texas U.C.C., and § 2.725 in particular, deal with *contracts for the sale of goods*. This confusion was warned against by the authors of the Restatement 2d of Torts. Comment *m* to § 402A of the Restatement 2d of Torts states in part:

> "A number of courts, seeking a theoretical basis for the liability, have reasoned that a 'warranty', either running with the goods sold, by analogy to covenants running with the land, are made directly to the consumer without contract. In some instances, this theory has proved to be an unfortunate one. . . . But if this is done, *it should be recognized and understood that the 'warranty' is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.*"

The Court of Appeals plainly erred in applying § 2.275 of the Texas U.C.C. to a case in which the substantive provisions of the U.C.C. do not apply. These conclusions are unreasonable.

4. In summary, this case presents the important issue of whether Federal Rule 15(c) or a state relation back rule will be applied in a case pending in federal court, based solely upon diversity of citizenship. This is an issue that arises frequently, and there is currently a split among the circuits. This court should resolve and clarify the issue.

CONCLUSION

For the reasons stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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July 13, 1987

APPENDIX A

Robert JOHANSEN,
Plaintiff-Appellant,

v.

E.I. DU PONT DE NEMOURS & CO.,
Defendant-Appellee.

No. 85-2835.

United States Court of Appeals,
Fifth Circuit.

March 2, 1987.

Plaintiff in personal injury action appealed from judgment of the United States District Court for the Eastern District of Texas, Howell Cobb, J., 627 F.Supp. 968, which granted defendant's motion for summary judgment. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) federal relation back rule applied; (2) amendment adding claims predicated on breach of implied and express warranty arising out of same accident on which products liability claim was asserted related back to the filing of the products liability complaint; and (3) four-year limitations period in the U.C.C. for breach of implied and express warranties was procedural rather than substantive and would thus apply under Texas law if the jurisdiction whose substantive law governed did not consider its own limitations period substantive.

Affirmed in part, vacated in part and remanded.

Joseph C. Blanks, Beaumont, Tex., for plaintiff-appellant.

Thomas H. Walston, O. J. Weber, Robert A. Black, Beaumont, Tex., for defendant-appellee.

Appeal from the United States District Court for the Eastern District of Texas.

Before GARZA, DAVIS, and JONES, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Robert Johansen, appeals from the district court's grant of summary judgment in favor of E.I. Du Pont de Nemours & Co. We affirm in part, vacate in part and remand.

I.

Robert Johansen, a citizen of the United Kingdom, was injured in Libya in March 1980, when an oil well casing gun he was assembling exploded. Almost three years after the accident, Johansen filed this action against E.I. Du Pont de Nemours & Co. (Du Pont) and eight others. All defendants other than Du Pont were dismissed on the basis of *forum non conveniens*. No appeal was taken from these dismissals.

Johansen asserted a products liability claim against Du Pont. He alleged in his original petition that the casing gun exploded because of a malfunction in the tool's primary explosive that was manufactured by Du Pont; he predicated his claim on both negligence and strict products liability. Two years after Johansen filed suit and almost five years after his injury, the district court permitted Johansen to amend his complaint to assert breaches of implied warranty of merchantability

and fitness. Du Pont moved for summary judgment on grounds that the Texas two year limitations period for personal injury actions barred the action.

In its memorandum opinion, 627 F.Supp. 968 (E.D. Tex. 1985), the district court concluded that Johansen's claims predicated on negligence and strict products liability were barred by the Texas two year statute of limitations. Tex. Rev. Civ. Stat. Ann. art. 5526 (Article 5526).[1] *Id.* at 970. See (Vernon 1958) (hereinafter referred to as Article 5526). The district court held that Johansen's original complaint did not sufficiently assert his breach of implied warranty claims. *Id.* at 973-74. The district court also held that under Texas Revised Civil Statute article 5539b,[2] the Texas relation back statute, Johansen's amended complaint could not relate back to his original complaint because the claim asserted in that complaint was time-barred. 627 F.Supp. 973. The district court also concluded that even if the federal relation back provisions of Rule 15(c), F.R.C.P., applied, Johansen's implied warranty claims were still prescribed. *Id.* Finally, the district court denied Johansen's motion for leave to

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1. Article 5526 was repealed in 1985 and a substantially identical provision is now found at Texas Civil Practice and Remedies Code § 16.003(a) (Vernon 1986).

2. Tex. Rev. Civ. Stat. Ann. art. 5539b (Vernon 1958) (hereinafter referred to as Art. 5539b). Article 5539b was repealed in 1985. This provision is now codified at Texas Civil Practice and Remedies Code § 16.068 (Vernon 1986). Section 16.068, which is substantially similar to Article 5539b, provides:

> If a pleading relates to a cause of action, . . . that *is not subject to a plea of limitation when the pleading is filed,* a subsequent amendment . . . that changes the facts or grounds of liability or defense is not subject to a plea of limitation unless the amendment . . . is wholly based on a new, distinct, or different transaction or occurrence.

Id. (emphasis added).

amend his complaint to assert a breach of express warranty claim because it determined that such a claim would be prescribed for the same reasons the implied warranty claims were time-barred. *Id.* at 974.

On appeal, Johansen does not dispute that the negligence and strict liability claims he asserted in his original complaint are prescribed. He asserts, however, that his original complaint sufficiently stated a claim for breach of implied warranty so that this claim was timely asserted under the four year statute of limitations provided in the Texas Uniform Commercial Code (UCC) for such claims.[3] Alternatively, he argues that under Rule 15(c), F.R.C.P., the filing of his amended complaint in February 1985, concededly outside the four-year period, relates back to the filing date of his original complaint and is not time barred under the Texas UCC. Finally, Johansen argues that the district court erred in denying his motion for leave to amend his complaint to include an express warranty claim because the express warranty claim is not time barred as found by the district court.

II.

A.

It is unnecessary to consider Johansen's contention that he stated a breach of implied warranty claim in his original complaint, because, for reasons that follow, we conclude that his amendment specifically asserting this claim relates back to his original petition.

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3. The provision reads in part as follows: "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . ." Tex. Bus. Comm. Code § 2.725 (Vernon 1968) (hereinafter referred to as section 2.725).

Johansen contends that the federal relation back rule applies in this case rather than the Texas rule that was applied by the district court. Rule 15(c), F.R.C.P., provides: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

[1, 2] When a federal rule of civil procedure specifically covers a particular situation, a federal diversity court is required to apply the federal rule unless application of the federal rule violates the Enabling Act or the Constitution. *Hanna v. Plumer,* 380 U.S. 460, 470, 85 S. Ct. 1136, 1143, 14 L.Ed.2d 8 (1965). *See also* 3 J. Moore, *Moore's Federal Practice* ¶ 15.15[2], at 15-144 (2d Ed. 1985). Rule 15(c) is a truly procedural rule because it governs the in-court dispute resolution processes rather than the dispute that brought the parties into court; consequently, it does not transgress the Rules Enabling Act. Furthermore, it is undisputed that Congress has the constitutional power to enact Rule 15(c) governing federal court practice.

Welch v. Louisiana Power & Light Co., 466 F.2d 1344 (5th Cir. 1972), is closely analogous to the facts presented in the instant case. In *Welch,* the amendment the plaintiff sought to make would not relate back under Louisiana law; therefore, if Louisiana law governed, plaintiff's action was barred by the applicable Louisiana prescriptive period. We held that relation back was governed by federal and not state law because there is a "strong presumption that the federal rules govern, rather than state law, in cases involving arguably procedural matters." *Id.* at 1345.

[3] Therefore, we conclude that Rule 15(c), the federal relation back rule, applies and the district court erred in applying the Texas relation back rule.

[4] Rule 15(c) requires a federal diversity court to allow the amendment to relate back to the date of the original filing if the amended pleading arose out of the "conduct transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . ." Johansen's claims predicated on breach of implied and express warranty arise out of the same accident on which he asserted a strict products liability claim in his original petition. The claims alleged in the amendments therefore arise out of the same transaction or occurrence as Johansen's products claims. Consequently, under Rule 15(c), the amendments relate back to the original petition. *Williams v. United States,* 405 F.2d 234, 237 (5th Cir. 1968); *United States v. Johnson,* 288 F.2d 40, 42 (5th Cir. 1961). *See also* 3 J. Moore, *Moore's Federal Practice,* ¶ 15.15[3], at 15-151 (2d Ed. 1985).

B.

We now turn to the district court's alternate ruling, that even if the amendments relate back to the original petition, Johansen's breach of implied and express warranty claims are prescribed under the Texas two-year limitations provision.

Erie principles require federal diversity courts to apply the conflict of laws provisions of the forum state. *Klaxon Co. v. Stentor Electric Mfg. Co.,* 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477 (1941). Texas law provides that an action for personal injury occurring outside the state and tried in a Texas court must be brought within the

time provided by Texas law. Tex. Rev. Civ. Stat. Ann. art. 4678 (Vernon 1975) (hereinafter referred to as Article 4678).[4] Procedural questions are governed by Texas law and the substantive law appropriate under the facts of the case must be applied. *Id.*

Applying Article 4678, the district court reasoned that only Texas procedural law applies; the court concluded that because Texas UCC section 2.725, which provides the limitations period for the UCC remedies of breach of implied and express warranties, was substantive rather than procedural it was inapplicable. Based on this reasoning, the district court held that the Texas two year prescriptive period provided by Article 5526 was the Texas procedural rule that governed this action. 627 F.Supp. at 973.

We disagree with the district court's conclusion that the four year limitations period provided in Texas UCC section 2.725 is substantive rather than procedural. As a general proposition, statutes of limitation are regarded as procedural. *Gaston v. B.F. Walker, Inc.*, 400 F.2d 671, 673 (5th Cir. 1968); 3 W. Hawkland, *Uniform Commercial Code Series* § 2-725:01, at 477 (1982). Texas courts consider a limitations period substantive in a particular circumstance: when a statute that creates a right not existing at common law also incorporates a limitation upon the time within which a suit is to be brought to enforce that right. *State of California v. Copus*, 158 Tex. 196, 309 S.W.2d 227, 231, *cert. denied*, 356 U.S. 967, 78 S. Ct. 1006, 2 L.Ed.2d 1074 (1958). In

4. Article 4678 was repealed in 1985 and a substantially identical provision is now found at Texas Civil Practice and Remedies Code § 71.031 (Vernon 1986).

such an instance, the "limitation qualifies the right so that it becomes a part of the substantive law rather than procedural. . . ." 158 Tex. at 201, 309 S.W.2d at 231.

The UCC provisions pertaining to implied and express warranties do not create new rights not existing at common law. A cause of action predicated on the implied warranty of merchantable quality was developed at English common law. Prosser, *The Implied Warranty of Merchantable Quality*, 27 Minn. L. Rev. 117-18 (1943). Before Texas adopted the UCC in 1968, its courts recognized a cause of action for breach of an implied warranty of product quality. *See, e.g., Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967).

Similarly, the action for breach of an express warranty relating to the quality of goods was also present at common law and in pre-UCC Texas decisions. *See* T.F. Plucknett, *A Concise History of the Common Law* 641 (5th ed. 1956); Prosser, supra, at 119-20; *Donelson v. Fairmont Foods Co.*, 252 S.W.2d 796 (Tex. Civ. App. 1952; *writ ref'd n.r.e.*); *Seale v. Schultz*, 3 S.W.2d 563 (Tex. Civ. App. 1927, no writ).

[5] Thus, the actions for breach of implied and express warranties were recognized at common law and by Texas courts before Texas adopted the UCC. Therefore, section 2.725, the limitation period for the UCC remedies for breach of implied and express warranties, is procedural rather than substantive.

[6] The district court, on remand, must determine what jurisdiction's law will govern the substantive legal

issues presented.[5] If that jurisdiction recognizes a distinct cause of action for breach of implied and express warranties, and if that jurisdiction's limitations period is not considered substantive, the four-year period provided by Texas UCC § 2.725 is the controlling limitations period for those actions. *Garcia v. Texas Instruments, Inc.*, 610 S.W.2d 456 (Tex. 1980). But, if that jurisdiction's limitations period is considered substantive, that provision will govern. *See Copus*, 158 Tex. 196, 309 S.W.2d 227, *cert. denied*, 356 U.S. 967, 78 S. Ct. 1006, 2 L.Ed.2d 1074 (1958). Because the amended complaints relate back to the original complaint, the implied and express warranty claims are not time barred under section 2.725.

CONCLUSION

We affirm the district court's dismissal of Johansen's negligence and strict products liability claims. We conclude, however, that we must vacate the district court's orders granting summary judgment on Johansen's implied warranty claims and denying Johansen's motion to amend his complaint to assert an express warranty claim because the record does not demonstrate that Johansen's implied or express warranty claims are time barred.

On remand, the district court should determine whether the applicable substantive law will permit Johansen to assert distinct claims predicated on implied and express

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5. Texas has adopted the position of the Restatement of Conflicts in resolving all choice of law questions. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984); *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979). The law of the jurisdiction with the most significant relationship to the facts surrounding the relevant issue to be decided must be applied. *Duncan*, 665 S.W.2d at 421; *Gutierrez*, 583 S.W.2d at 318-19. *See generally Restatement (Second) Conflict of Laws* §§ 6, 145 and 188 (1971).

warranties; if so, the district court will apply the four-year limitation period in section 2.725 unless the foreign limitations period applicable to such claims is determined to be substantive law.

Accordingly, the judgment of the district court is affirmed in part, vacated in part and remanded for further proceedings consistent with this opinion.

AFFIRMED in part, VACATED in part and REMANDED.

APPENDIX B

Robert JOHANSEN

v.

E.I. DUPONT DE NEMOURS AND CO.

No. Civ. A. B-83-155-CA.

United States District Court,
E.D. Texas,
Beaumont Division.

Nov. 7, 1985.

English oil field worker who was injured while loading a casing gun in Libya brought action against gun's supplier. On defendant's motion for summary judgment, the District Court, Cobb, J., held that: (1) Texas' two-year limitations period rather than United Kingdom's three-year limitations period, applied; (2) rule providing for relation back of amendment to date of original pleading did not apply; and (3) under rule requiring that pleadings be construed as to do substantial justice, worker's original complaint did not set forth a claim for relief for alleged breach of implied warranties.

Case dismissed.

Joe Blanks, Beaumont, Tex., for plaintiff.

O. J. Weber, Tow Walston, Beaumont, Tex., for defendant.

MEMORANDUM OPINION

COBB, District Judge.

In this action, the defendant E.I. du Pont de Nemours & Co., Inc. (DuPont) seeks a summary judgment as to the action brought against it by the plaintiff Robert Johansen (Johansen). The plaintiff desires leave to re-amend his complaint to state an additional claim for relief against the defendant. For the reasons explained herein, the defendant's motion for summary judgment is granted and the plaintiff's motion for leave to file amended second amended original complaint is denied

Johansen alleges that he was an English oilfield worker who was working in Libya for one of the Halliburton companies when he was injured within the course and scope of his employment. He states that on March 30, 1980, as a part of his job, he was loading a casing gun. The gun, its charge and its components are alleged to have been designed, manufactured, supplied or sold by DuPont and other parties which have been dismissed from this action. The gun apparently discharged, causing injuries to the plaintiff.

This federal action was initially filed on February 23, 1983, alleging diversity jurisdiction as against DuPont and several other parties. All defendants other than DuPont were dismissed from this action on the basis of *forum non conveniens*. In the plaintiff's original complaint, the claims for relief were negligence and products liability. On February 6, 1985, Johansen amended his complaint to assert breaches of the implied warranties of merchantability and fitness for a particular purpose as additional claims. DuPont moved for summary judgment

on the basis that all of the plaintiff's claims for relief were time barred under the relevant statutes of limitation. Johansen has sought the leave of the court to further amend his complaint to add breach of express warranty as a further claim for relief. The parties have each contested the other's pending motion.

DuPont asserts that under the relevant Texas conflicts law, Texas procedural law prescribes the time in which the suit may be brought. The time allowed in a personal injury action is two years from the date of the injury. Since the actions for negligence and product liability were not brought within two years of the injury, DuPont contends that they are time barred. DuPont further states that the four-year statute of limitations provided in the Texas Uniform Commercial Code for breach of warranty actions does not save plaintiff's claim because the breach of warranty actions were not brought within four years from the time of the accident and is therefore also time barred. Additionally, DuPont states that the Texas Uniform Commercial Code does not apply because plaintiff's cause of action has no relationship to the State of Texas. Finally, the defendant claims there can be no claim for relief for breach of implied warranties since DuPont specifically disclaimed all warranties of merchantability and fitness for a particular purpose.

Johansen responds to the defendant's motion by asserting that the laws of the United Kingdom control the time for filing suit, thereby extending the time for filing an action for negligence to three years from the date of the accident. He also claims that the Texas statute of limitations has not run because his original complaint contained language sufficient to give fair

notice to the defendant of the nature and grounds of his action for breach of implied warranty. Johansen further contends that the amended complaint relates back to the date of the original complaint thereby bringing the filing of the action for breach of implied warranties within the four-year limitation period. Finally, the plaintiff states that the disclaimer of warranties made by DuPont presents genuine issues of fact which precludes summary judgment based upon the disclaimer.

This court after hearing the parties' argument and having carefully considered the law and evidence of this case concludes that DuPont's motion for summary judgment should be granted and that Johansen's motion to file second amended original complaint should be denied.

I. NEGLIGENCE AND PRODUCT LIABILITY

[1] This court holds that the claims for relief in each of the plaintiff's various complaints which are based upon negligence and product liability are time barred. As there can be no award granted on these claims under the Texas statutes, summary judgment is appropriate.

It is well settled that in a federal diversity action, the law of the forum state controls the substantive law involved in the action.[1] This doctrine extends to include the forum state's conflict of laws provisions.[2]

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1. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938).

2. *Klaxon Company v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477 (1941).

Since this action was commenced in Texas, that state's conflict of laws provisions guide this court in its decision. The Texas personal injury conflicts provision requires that Texas procedural law and the appropriate substantive law are to be applied to an out-of-state injury tried before a Texas court.[3] Statutes of limitation are generally recognized to be procedural in nature,[4] and therefore will usually come from Texas statutes when the case is heard by a state or federal court in Texas.

VERNON'S ANNOTATED TEXAS CIVIL STATUTES, Article 5526 (Art. 5526), states:

> There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description: . . .
>
> 6. Action for injury done to the person of another.

Since there is no dispute that the injury which Johansen is suing upon occurred on March 30, 1980, and that the action was not commenced until February 23, 1983,

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3. "Whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any foreign state or country for which a right to maintain an action and recover damages thereof is given by the statute or law or such foreign state or country or of this state, such right of action may be enforced in the courts of this state within the time prescribed for the commencement of such actions by the statutes of this state. All matters pertaining to procedure in the prosecution or maintenance of such action in the courts of this state shall be governed by the law of this state, and the court shall apply such rules of substantive law as are appropriate under the facts of the case." VERNON'S TEX. REV. CIV. STAT. art. 4678 (Art. 4678).

4. *Gaston v. B.F. Walker, Inc.*, 400 F.2d 671 (5th Cir. 1968).

there can be no dispute that the product liability and negligence actions are time barred under Texas procedural law.

Johansen contends that the United Kingdom's three-year statute of limitation controls. This argument is based upon the premise that since Judge Justice dismissed the original actions against all defendants except DuPont, he implicitly and necessarily chose United Kingdom law to control this case. This presumption is unlikely in that since the accident occurred in Libya, Libya appears to be the site with the most significant relationship to the accident. Libyan law would normally be the substantive law to apply in this case.[5] If there were no cause of action under Libyan law, or if England had greater significant contacts with the accident, then the court might resort to the law of the United Kingdom. But regardless of the validity of plaintiff's assumption that Judge Justice chose to follow British substantive law the United Kingdom's statutes of limitation do not apply. British substantive law could only be applicable because of the last sentence of Art. 4678. The plaintiff states that the three-year limitation for negligence actions is incorporated into the British statute permitting a cause of action for negligence and is therefore substantive and controlling. However, even if it is assumed that the substantive law of the United Kingdom is appropriate, there has been no adequate showing as to what that law actually provides. There has been no affidavit or testimony as to the provisions of the relevant British law. This court is not prepared to take judicial notice of what the law of the United Kingdom might be. Because there has been no

5. *Gutierrez v. Collins,* 583 S.W.2d 312 (Tex. 1979).

adequate showing of what the relevant British limitation period is, much less that it is substantive in nature, the Texas two-year limitation controls and bars the actions for negligence and products liability.

II. IMPLIED WARRANTY

[2] The Texas Uniform Commercial Code provides that a cause of action for breach of an implied warranty must be commenced within four years after the cause of action has accrued.[6] In *Garcia v. Texas Instruments, Inc.*, 610 S.W.2d 456 (Tex. 1980), the Supreeme Court of Texas held that a claim for a personal injury arising from a breach of an implied warranty could be brought within the four-year limitation period of this section rather than the two-year period normally set out for personal injuries. The issue presented is whether the four-year period in which to commence the suit saves the plaintiff's claim for breach of implied warranties.

Because the plaintiff's first amended original complaint was filed on February 6, 1985, the issue as to whether the two- or four-year limitation applies is moot. The breach of an implied warranty (and therefore the time of the accrual of the action) occurs at the time of the sale of the goods in question.[7] At the latest, the time of the accrual of the action would be slightly before the time of the injury. Because the amended complaint was filed almost five years after the accident, the action for the implied warranty is time barred under any relevant statute of limitation.

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6. VERNON'S TEXAS CODES ANNOTATED, BUSINESS AND COMMERCE § 2.725 (§ 2.725).

7. *Timberlake v. A.H. Robins Co., Inc.*, 727 F.2d 1363 (5th Cir. 1984).

However, Johansen asserts that the amended complaint relates back to the time of the filing of the original complaint, thereby saving his actions for breach of warranty if the four-year limitation controls. As this argument goes, the four-year limitation period of § 2.725 would be applied back from the date of the original complaint, thereby falling within the permissable period for filing an action for breach of warranty. The applicable Texas relation back statute is VERNON'S ANNOTATED TEXAS CIVIL STATUTES, Article 5539b (Art. 5539), which in relevant part provides that as long as the original action is not subject to a plea in limitation, an amendment will not be subject to a plea in limitation. However, in the present case, the original action *was* subject to a plea of limitation, preventing the amended pleading from relating back. Under similar circumstances, the federal district court in *Powell v. Brantley Helicopters Corporation,* 396 F.Supp. 646 (E.D. Tex. 1975), held that the amended complaint did not relate back to the time of the original complaint since the claims in the original complaint were time barred.

The plaintiff attempts to salvage his claim by asserting that Federal Rule of Civil Procedure 15(c), (Rule 15[c]) provides for relation back of the amendment to the date of the original pleading despite the fact that the Texas statutes do not permit it. There are several Fifth Circuit cases holding that Rule 15(c) controls in federal diversity cases despite more restrictive state doctrines.[8] This line of decisions is supported by the Supreme Court's ruling in *Hanna v. Plumer,* 380 U.S. 460, 85 S. Ct. 1136, 14

8. *See, Skidmore v. Syntex Laboratories, Inc.,* 529 F.2d 1244 (5th Cir. 1976). Ca. *Anderson v. Papillion,* 445 F.2d 841 (5th Cir. 1971).

L.Ed.2d 8 (1965), which stated that when a federal rule actually speaks to a particular point of practice or pleadings, it governs federal diversity proceedings even if the state law would yield a different result. This ruling essentially ended the *Erie R. Co. v. Tompkins, supra,* test as to procedural/substantive classification for cases where the Federal Rules of Civil Procedure is directly applicable. The outcome determination test of *Guaranty Trust Co. v. York,* 326 U.S. 99, 65 S. Ct. 1464, 89 L.Ed. 2079 (1945) was limited in the same type of cases.

Hanna v. Plumer, supra, was clarified by the Supreme Court in *Walker v. Armco Steel Corp.,* 446 U.S. 740, 100 S. Ct. 1978, 64 L.Ed.2d 659 (1980). In this decision, the Court held that *Hanna* requires an inquiry into whether the scope of the federal rule is so large that it actually conflicts with the state law.[9] Only where there is a direct collision between the federal rule and the state law is a court required to determine whether the federal rule is within the scope of the Rules Enabling Act, 28 U.S.C. § 2072 (Enabling Act).[10] The outcome-determination test of *Erie* and *York* are to be read with reference to the aims of *Erie;* discouragement of forum-shopping and avoidance of inequitable administration of laws.[11]

Applying the analysis of *Hanna* as illuminated by *Walker,* this court is of the opinion that Rule 15(c) does not require the amended complaint to relate back to the filing of the original complaint. There is no conflict between Federal Rule 15(c) and Art. 5539b, at least in the circumstances of this case.

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9. *Walker v. Armco,* 446 U.S. at 749-50, 100 S. Ct. at 1984-85.

10. *Ibid.* at 748, 100 S. Ct. at 1984.

11. *Ibid.* at 747, 100 S. Ct. at 1983.

Rule 15(c) must be examined in context. The Federal Rules of Civil Procedure were created through Congress' delegation of authority to the Supreme Court by means of the Federal Rules Enabling Act. The Enabling Act states that the federal rules ". . . shall not abridge, enlarge or modify any substantive right . . ."[12] In *Walker v. Armco Steel Corp., supra,* the Supreme Court required that a federal rule be tested against both the Rules Enabling Act and the Constitution.[13] The authority of a federal rule cannot be greater than the authority which gave it being.[14] A federal rule is not to be applied to the extent that it would defeat rights arising from state substantive law as distinguished from state procedure.[15] With this established, it is clear that Rule 15(c) and Art. 5539b could only conflict over procedural matters, as Rule 15(c) cannot purport to control substantive matters.

Under relevant state and federal case law, the statute of limitations contained within § 2.725 of the Texas U.C.C. is substantive as opposed to procedural. "Where a statute incorporates a limitation upon the time within which the suit is to be brought, the limitation qualifies the right so that it becomes a part of the substantive law rather than procedural." *State of California v. Copus,* 158 Tex. 196, 309 S.W.2d 227, 231 (1985); *Weisz v. Spindletop Oil and Gas Co.,* 664 S.W.2d 423 (Tex. App.—13 Dist. 1983); and *Cox v. McDonnell-Douglas Corp.,* 665 F.2d 566 (5th Cir. 1982). Though statutes

12. 28 U.S.C. § 2072.

13. *Walker,* at 748, 100 S. Ct. at 1984.

14. *See,* Wright, Miller & Cooper, *Federal Practices and Procedure: Jurisdiction* § 4509.

15. *Marshall v. Mulrenin,* 508 F.2d 39 (1st Cir. 1974).

of limitation are generally classified as procedural, they are substantive when the limitation provision is itself an integral part of the statute creating the cause of action. *Gaston v. B.F. Walker, Inc., supra* at 673. There can be no doubt that the four-year limitation period is integral to the cause of action for breach of warranty, and this court so holds. Therefore, since Rule 15(c) does not apply because of limitations of the Enabling Act, Art. 5539b is the only relation back statute available to the plaintiff. Because Art. 5539b does not apply when the original claim is time barred, the implied warranty claim cannot relate back and is itself time barred.

To hold otherwise would give rise to absurd results. As stated in 51 Am. Jur. 2d, *Limitations of Actions* § 15 (1970):

> Although the general rule is that a true statute of limitations extinguishes only the right to enforce the remedy and not the substantive right itself. the limitation of time for commencing an action under a statute creating a new right enters into and becomes a part of the right of action itself and is a limitation not only of the remedy but of the right also; the right to recover depends upon the commencement of the action within the time limit set by the statute, and if that period of time is allowed to elapse without the institution of the action, the right of the action *is gone forever.* (Emphasis added)

See Jamerson v. Miles, 421 F. Supp. 107 (N.D. Tex. 1976). A right of action cannot be gone forever and then be related back a few years later. To relate the warranty action back also serves to encourage an in-

equitable administration of laws and fails the outcome determination test to which *Hanna* still attached weight.[16]

[3] Regardless of the availability of Rule 15(c), the four-year limitation of § 2.725 is inapplicable in the case at bar. As previously noted, the Texas conflict of laws provisions govern this court's application of law. Art. 4678 states that a Texas court will apply its own procedural law and the appropriate substantive law. Under the laws of the State of Texas, the statute of limitations in the Texas U.C.C. is substantive and therefore will not apply where the injury occurs in a foreign state or country.[17] Because the § 2.725 statute of limitations is substantive in nature, it will not be applied as an Art. 4678 procedural matter, and the "time prescribed for commencement" of the action is not the four-year limitation of § 2.725 but the two-year period of Art. 5526. Therefore, even if the doctrine of relation back applied, plaintiff would be no better off.

[4] Johansen falls back to the position that his original complaint was sufficient to charge DuPont with a breach of implied warranties. The pleadings of the case do not support this contention. According to the plaintiff's original complaint, the lawsuit was "brought to recover for injuries suffered by the plaintiff." The proximate cause of the accident was stated to be the negligence of the defendants. Alternatively, the gun or its components were defective and/or unreasonably dangerous, which was stated to be a producing cause of the incident.

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16. *Hanna v. Plumer, supra,* 380 U.S. at 473, 85 S. Ct. at 1145.

17. *See* note 5.

The plaintiff relies on Federal Rule 8 in his attempt to include a breach of implied warranties in his original complaint. There is no doubt that the original complaint set out claims for relief as to the negligence and products liability charges. The issue is whether Johansen set forth a claim for relief for the alleged breach of implied warranties. Even under the broad provision of Federal Rule 8, it cannot be held that the plaintiff met this burden. In *Conley v. Gibson,* 355 U.S. 41, 47, 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957), the U. S. Supreme Court held that the Federal Rules require a short, plain statement of the claim that gives the defendant fair notice as to what the claim is and the grounds upon which it rests. In the present action the original complaint did not give the required notice. The entire complaint was worded in terms of negligence and product liability. Not only were these causes of action specifically named, but the necessary elements of each were set out. However, there was no mention of *any* warranty, implied or expressed. The only elements of an action for breach of implied warranties alleged were those which were necessary to prove one of the other specified causes of action. Allegations that the defendant manufactured and sold a dangerous or defective product and that the plaintiff was injured while using the product were not sufficient to alert the defendant that the plaintiff was asserting a claim for relief for a breach of implied warranties.

Substantial justice does not require that the court discover unstated claims for relief simply because the stated claims are barred. Further, it does not require that the defendant take notice of claims which the plaintiff does not assert. It does, however, require that pleadings

give some meaningful notice as to the claims involved. Since the original complaint did not give the required minimal notice on the breach of implied warranties claim, substantial justice requires that this court hold that no such claim arose until the plaintiff filed his amended complaint.

The court having found that the four-year limitation of § 2.725 does not save the cause of action for breach of implied warranties, it is not necessary to examine the defendant's contentions that the Texas U.C.C. does not apply because Texas had no relationship to the incident and that all warranties were effectively disclaimed. DuPont's motion for summary judgment is granted as to this claim for relief on the basis that it is time barred.

III. EXPRESS WARRANTY

In his motion to file amended second amended original complaint, Johansen wishes to assert breach of express warranty as an additional claim for relief. For the same reasons that the actions for implied warranties were not timely acted upon, an action for express warranty would not be timely. Because all actions based upon breach of warranties are time barred, the plaintiff's motion to re-amend his complaint is denied.

Accordingly, this court grants the defendant's motion for summary judgment and denies the plaintiff's motion to file amended second amended original complaint. Having so ruled, this case is dismissed as there are no causes of action before the court.

IT IS SO ORDERED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2835

ROBERT JOHANSEN,
Plaintiff-Appellant,

v.

E.I. DU PONT DE NEMOURS & CO.,
Defendant-Appellee.

ON PETITION FOR REHEARING

(April 14, 1987)

Appeal from the United States District Court for the
Eastern District of Texas

Before GARZA, DAVIS and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ W. EUGENE DAVIS
United States Circuit Judge

APPENDIX D

Pursuant to Supreme Court Rule 28.1, Du Pont lists the following subsidiaries and affiliated companies, other than wholly owned subsidiaries:

I. COMPANIES 50% OR MORE OWNED BY DU PONT:

Concord Limited Partnership

Du Pont Canada Inc.
- Augusta Natural Gas Limited (inactive)
- Canada Development Corporation
- Cedarcrest Company Limited (inactive)
- CSA Minerals Limited
- Du Pont Chemicals & Textiles (B.C.) Limited (inactive)
- Du Pont Chemicals & Textiles (Eastern) Limited (inactive)

Du Pont du Quebec Limitee (inactive)
Du Pont of Canada Exploration Limited
Polysar Limited

Du Pont—Idemitsu Co., Ltd.

Du Pont—MGC Co., Ltd.

Du Pont—MRC Company, Ltd.

Du Pont—Mitsui Fluorochemicals Company, Ltd.
- Ebina Sangyo K.K.

Du Pont—Mitsui Polychemicals Company, Ltd.
- Hi-Sheet Industries, Ltd.
- Mitsui Nisseki Polymers Co., Ltd.

Du Pont—Norol Maintenance Services A.S.

Du Pont—Sankyo Pharmaceuticals Co., Ltd.

Du Pont—Showa Denko Co., Ltd.

Du Pont—Toray Company, Ltd.

DUSA

COMPANIES 50% OR MORE OWNED (Cont'd)

DX Imaging

FMC/Du Pont Food Separations, Inc.

NIACHLOR—(New York Partnership)

Nordisk Alkali Biokemi A/S

Oncogenetics Partners (Mass. Partnership)

PD Glycol Limited—(Texas Partnership)

PD Magnetics B.V.

Philips and Du Pont Optical Company
(PDO-US) (Delaware Partnership)

Philips and Du Pont Optical Company
(PDO-NL) (Netherlands Partnership)
Philips and Du Pont Optical U.K. Ltd.
Optical Storage International GB
Necesse B.V.
BV1, BV2, BV3, BV4
Philips and Du Pont Optical
Deutschland GmbH
PDO GmbH
Optical Storage International—Holland

PROCOMP (Delaware Partnership)

Showa Neoprene K.K.

Societe En Nom Collectif Du Pont de Nemours
(France) S.A. et Rhone-Poulenc Industries
("Butachimie SNC")—(Partnership)

II. OTHER AFFILIATED COMPANIES:

Aviones B.C., S.A. de C.V.

Avtek Corporation

Biotech Research Laboratories, Inc.

Cine Film Systems

OTHER AFFILIATED COMPANIES (Cont'd)

Delaware River Cooperative (Partnership)

Derivados Sinteticos, S.A. de C.V. (inactive)

Dunlena Pty. Limited Australia

EPIC Insurance Company, Inc.

Gemeinnutzige Wohnungsbau GmbH

Greyhawk Systems, Inc.

Haemonetics Corporation

HEM Research, Inc.

ImagiTex Incorporated

Ingenieurgesellschaft Fur Agragtetechnik GmbH

La Domincia, S.A. de C.V.
Geomina S.A.

Laserscope Biomedical Corporation

Molecular Biosystems, Inc.

Nylon de Mexico, S.A.
Inser S.A.
Univex, S.A.

Perceptive Systems Incorporated

POC Research (Partnership)

Quimica Fluor, S.A. de C.V.

Reactivos Minerales Mexicanos S.A. de C.V.

Tetraetilo de Mexico, S.A.

Thapur—Du Pont Limited

TVS Du Pont Electronics Ltd.

Wilmington Trust Company

III. LESS THAN WHOLLY OWNED SUBSIDIARIES DIRECTLY OR INDIRECTLY OWNED BY DU PONT'S WHOLLY OWNED SUBSIDIARY CONOCO DELAWARE, INC:

Subsidiary

Big Sky of Montana Realty, Inc.

Cit-Con Oil Corporation

Coman I Limited (Partnership)

Coman II Limited (Partnership)

Coman III Limited (Partnership)

Conch International Methane Ltd.

Du Pont Scandinavia AB

AB Branslecentralen
ARA Aktiebolag
ARA Bolagen AB
ARA Fotogenservice AB
ARA Gavle AB
ARA Jonkoping AB
ARA Norrkoping AB
Conara AB
Jet Trading AB
Svenska Kol ARA AB
Vaermecenter Sven Meijer Aktiebolag

T.A.L.

A.C.E. Insurance Co.

EXEL Limited

Khalda Petroleum Co.

Geisum Oil Co.

Conoco Exploration, Ltd. (Partnership)
Continental Oil Limited (Partnership)

Societue du Pipeline Sud-Europueenne

Subsidiary (Cont'd)

T.A.L.

K/S Stratfjord Transport A.S. & Co.
Stratfjord Transport A.S.

Cardinal River Coals, Ltd.
Neptune Bulk Terminals (Canada) Ltd.

Mathies Coal Co.

Tongue River Holdings, Inc.
Tongue River Railroad (Partnership)
Ameropa Coal Trading and Shipping, Inc.

Oasis Oil Co. of Libya, Inc.

Colonial Pipeline Company
Milne Point Pipe Line Company (Partnership)
Dixie Pipeline Company
Explorer Pipeline Company
Lake Charles Pipe Line Company
Pioneer Pipe Line Company
Platte Pipe Line Company
Yellowstone Pipe Line Company

Felix Oil Company

Jupiter Chemical Inc.

Kettleman North Dome Assoc.

Long Beach Oil Deleopment Company

Oberrheinische Mineraloelwerke GmbH (OMW)

Petco Enterprises Ltd.

Petrocokes, Ltd.

Petroleum Terminals, Inc.

Iranian Investment Corp.
Iranian Oil Participants Ltd.
Iranian Oil Services (Holdings) Ltd.
Iricon Agency, Ltd.

Subsidiary (Cont'd)

Southern Facilities, Inc.

The Standard Shale Products Company

Tidelands Royalty Trust

Associated Petroleum Terminals Ltd.
Benzene Marketing Co. Ltd.
BT&D Technologies
Cliffe Storage Ltd.
Crude Oil Terminals (Humber) Ltd.
Humber Oil Terminals Trustee Ltd.
Petroleum Storage Ltd.
Warwickshire Oil Storage Ltd.

K/S Stratfjord Transport A.S. & Co.
Stratfjord Transport A.S.

IV. The Seagram Company Ltd., through its wholly owned subsidiary companies, owns approximately 22% of Du Pont Common Stock. However, Du Pont does not consider itself to be an affiliate of Seagram because Seagram does not have the actual power to directly or indirectly control Du Pont.